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November 14, 2014

SUBMITTED ELECTRONICALLY

Water Docket  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: Docket No. EPA-HQ-OW-2011-0880; Definition of “Waters of the United States” Under the Clean Water Act**

Dear Administrator McCarthy and Lieutenant General Bostick:

On behalf of the members of the Iowa Farmers Union (IFU), thank you for the opportunity to submit written comments to the Environmental Protection Agency (EPA) and the Department of the Army, Corps of Engineers (Corps), regarding the proposed rule defining “Waters of the United States” under the Clean Water Act (WOTUS).

Since 1915, IFU members have worked together to strengthen the independent family farm and to provide Iowans with sustainable production, safe food, a clean environment and healthy communities. Our farm families operate farms ranging from less than 2 acres to more than 2,000 acres, producing a diverse array of agricultural products, including corn, soybeans, small grains, livestock, dairy, fruits and vegetables, organic and specialty crops, and value-added agricultural goods. While we are a diverse organization, our family farmer members share a common commitment to acting as responsible stewards of the land and water resources entrusted to us by previous generations and caring for those resources on behalf of future generations of farm families.

A clean and abundant water supply is essential to the continued viability of Iowa’s family farms, as well as the health and vitality of our communities. IFU policy strongly supports public programs and policies that encourage the adoption of environmentally sound agricultural practices, including on-farm conservation and pollution control measures that protect our valuable soil and water resources. Our farmer members believe that responsible farming practices can promote the goal of protecting and improving the quality of Iowa’s watersheds, while also maintaining the economic well-being of farming operations.

The proposed WOTUS rule has been extremely controversial in the farming community in Iowa, with some farm organizations prominently calling for EPA and the Corps to “ditch the rule.” While we greatly appreciate the significant time and effort that agency staff have put into meeting with members of the farming community, providing information, and answering questions, there still are serious ambiguities and contradictions in the proposed rule that have played into the controversy and the concerns

expressed by Iowa farmers. To be clear, IFU does not support calls to withdraw the proposed rule in its entirety. We recognize that EPA and the Corps have worked for years trying to design a set of updated rules that accurately reflect the most recent Supreme Court rulings and agency regulatory practices. Withdrawing the rule would not alter the agencies' on-going obligation to comply with current case law. Many organizations from both the environmental community and the regulated community have rightly called for the present rulemaking to provide increased clarity and regulatory certainty. We hope that these comments, together with those submitted by the National Farmers Union and other farm organizations that have chosen to engage constructively in the process, will assist in crafting a final rule that resolves the ambiguities and the legitimate concerns that have been raised by the agricultural community.

To provide needed clarity and certainty for farm operators, the final rule should incorporate these basic principles:

- Clear, plainly written standards that allow farmers to easily identify the agricultural practices that are exempt from regulation, regardless of the presence of a jurisdictional water;
- Clear, plainly written standards that create easily applied, bright-line tests to allow farmers to evaluate whether waters co-located with a farming operation are likely to be jurisdictional;
- Clear and detailed guidance defining the process for enforcing the proposed rule in the context of active farming operations; and
- Strong, well-defined protections for on-farm conservation and pollution control practices that will protect and/or enhance water quality.

### **Defining Exemptions for Agricultural Activities**

As a rule, any discharge made to a water of the United States from a point source requires a National Pollutant Discharge Elimination System (NPDES) permit. However, the Clean Water Act specifically provides that a discharge resulting from "normal farming activities" carried out as part of an established farming operation are exempt from NPDES permitting requirements. The specific list of exempt activities under section 404(f)(1)(A) of the Clean Water Act includes:

Normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices, as well as other activities of essentially the same character as named.

EPA and the Corps have determined that such "other" exempt activities include conservation activities carried out within the waters of the United States that are designed to protect and enhance water quality.

As a baseline matter, farmers need absolute clarity in the final rule reinforcing this exemption and more precisely defining the normal farming activities that fall within the exemption. In practical terms, providing a clear answer to this initial question would eliminate the vast majority of farmers' concerns before ever touching on the much more complex question of defining and identifying jurisdictional waters. The preamble of the proposed rule indicates that existing regulatory exemptions for normal farming activities will not be impacted by the rule. However, this issue has been significantly muddled in conversations within the farming community as a result of the Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to

Certain Agricultural Conservation Practices (Interpretive Rule), which was finalized by EPA and the Corps on March 25, 2014.

The Interpretive Rule specifically addresses agricultural conservation practices that are based on Natural Resources Conservation Service (NRCS) standards and that are designed and implemented to protect and enhance water quality. The Interpretive Rule states that, "it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt" from NPDES permitting requirements. The language of the Interpretive Rule further assures farmers that, in conformance with congressional intent, "beneficial agricultural conservation practices will not be unnecessarily restricted so long as those activities are designed and implemented to protect and enhance water quality and do not destroy waters."

The Interpretive Rule then outlines a specific NPDES permitting exemption for agricultural conservation activities that:

- (1) are part of an established (i.e., ongoing) farming, silviculture or ranching operation; and
- (2) are implemented in conformance with NRCS technical standards.

Limiting the exemption to activities that conform to NRCS technical standards directly undermines the earlier assertion that "other" exempt activities would include any conservation activities "designed to protect and enhance water quality". In addition, tying the exemptions specifically to NRCS technical standards imposes an undue burden on farmers installing or maintaining on-farm conservation features and creates a completely unworkable scheme in terms of monitoring and enforcement.

Farmers do occasionally seek technical advice from the local NRCS field office when installing an on-farm conservation feature. However, this is not a requirement, unless the farm is applying for federal assistance that is tied to compliance with NRCS technical standards. Even where compliance with NRCS technical standards is required, enforcement is carried out through random spot checks, and NRCS does not have the resources or the desire to monitor every farm that has installed a conservation feature. In practice, whether a farmer consults with NRCS or not, it is fairly common for an on-farm conservation feature to deviate in some respects from NRCS standards. NRCS in Iowa has expressly stated that agency staff will have zero involvement in the monitoring and enforcement of their technical standards in the context of Clean Water Act enforcement.

The bottom-line takeaway from the Interpretive Rule is that Iowa farmers have been left with the impression that on-farm conservation activities have to comply with NRCS technical standards in order to be exempt from NPDES permitting requirements. If this was the intent of the Interpretive Rule, such a requirement would create unnecessary technical barriers for conservation activities and would constitute a counterproductive disincentive to farmers who are otherwise inclined to act in a way that would improve water quality. If this was not the intent of the Interpretive Rule, then the final rule should make absolutely clear that farmers will not need a NPDES permit for any normal farming activities carried out as part of an established farming operation, specifically including beneficial agricultural conservation practices that are designed and implemented to protect and enhance water quality and that do not destroy existing waters - regardless of whether such practices comply with NRCS technical standards.

IFU supports the continued exclusion for prior converted cropland from the definition of “waters of the United States,” which is contained in the proposed rule. This exclusion is consistent with the treatment of prior converted cropland in federally administered farm programs.

### **Definition of Jurisdictional Waters**

IFU does not take a position as to whether it is proper for the proposed rule to either expand, maintain, or contract the definition of “waters of the United States” under the Clean Water Act. Attempting to numerically quantify and compare fluctuations in jurisdictional scope is of much less practical importance to our farmers than is ensuring that the final rule conforms to current case law, that it provides clarity and regulatory certainty, and that it fairly and adequately takes into account the legitimate issues and concerns raised by the agricultural community.

#### *Definition of “Waters of the United States”*

The proposed rule specifically provides that “waters of the United States” will include the following:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of the waters identified in paragraphs (1) through (3) and paragraph (5);
- (5) All **tributaries** of the waters identified in paragraphs (1) through (4);
- (6) All waters, including wetlands, **adjacent** to a water identified in paragraphs (1) through (5);
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other **similarly situated** waters, including wetlands, located in the same region, have a **significant nexus** to a water identified in paragraphs (1) through (3).

Paragraphs (1) through (4) merely re-state long-established regulatory practice, so the following comments will focus on paragraphs (5) through (7).

#### *Definition of “Tributary” Under Paragraph (5)*

The proposed rule defines “tributary” as a water physically characterized by the presence of a bed and banks and an ordinary high water mark which contributes flow, either directly or through another water, to a water identified in paragraphs (1) through (4). The proposed definition of tributary also includes wetlands, lakes, and ponds, even if they lack a bed and banks or ordinary high water mark, if they contribute flow, either directly or through another water, to a water identified in paragraphs (1) through (3).

The proposed rule states that a tributary may include one or more man-made breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary can be a natural, man-altered, or man-made and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not elsewhere excluded.

The proposed rule is the first time that EPA and the Corps have proposed a regulatory definition of “tributary,” and in general, we support the creation of clearly defined *per se* categories of jurisdictional waters to promote increased regulatory certainty. However, the proposed definition of “tributary” has led to considerable confusion and concern among farmers particularly regarding the inclusion of wetlands, lakes, and ponds that lack the specific enumerated features of a tributary (bed, banks, and an ordinary high water mark). To further the goal of crafting an easily applied bright-line rule, we propose incorporating the following changes in the final rule:

- Include the plain language definition of “ordinary high water mark” in the text of the rule, rather than referring back to another regulation.
- Clarify that the specific enumerated features of a tributary (bed, banks and an ordinary high water mark) take years to form, and that the rule will not regulate temporary accumulations of water resulting from isolated events, such as heavy precipitation.
- As part of the non-exhaustive list of examples of regulated tributaries (rivers, streams, lakes, ponds, impoundments, canals, and ditches), specify that regulated ditches are only those ditches that are constructed through a wetland or stream and that have a perennial flow. Agricultural drainage ditches have been a particularly sore topic among farmers in discussing the proposed rule, and any additional clarity that can be directly incorporated into the language of the final rule on this topic would be extremely helpful.
- Limit the definition of “tributary” to those waters that actually have a bed and banks and an ordinary high water mark. Wetlands and other waters lacking these features can be adequately covered as either “adjacent waters” under paragraph (6), or on a case-by-case basis pursuant to the “significant nexus” text under paragraph (7). Including wetlands and other waters with no bed or banks or ordinary high water mark within the definition of “tributary” undermines the goal of creating a clear, bright-line rule, making it more difficult for the regulated community to easily apply the rule, and is not necessary to the overall goal of protecting and enhancing water quality

#### *Definition of “Adjacent” Under Paragraph (6)*

The proposed rule defines “**adjacent**” as “bordering, contiguous, or neighboring” and provides that waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent” waters. The proposed rule defines “neighboring” waters as those waters located within the riparian area or floodplain of a water identified in paragraphs (1) through (5), or those waters having either a shallow subsurface or confined surface hydrologic connection to such waters.

The proposed rule is the first time that EPA and the Corps have proposed a regulatory definition for “neighboring” waters. Again, while we generally support the creation of clearly defined *per se* categories of jurisdictional waters to promote increased regulatory certainty, the proposed definition of “neighboring” waters has caused considerable confusion and concern for our farmers, particularly regarding the inclusion of waters having either a shallow subsurface or confined surface hydrologic connection to other regulated waters. To further the goal of crafting an easily applied bright-line rule, we propose incorporating the following changes in the final rule:

- The final rule should adopt a reasonable limitation to the term “floodplain.” For example, limiting the scope of “neighboring” waters to those waters located within the established 20-year floodplain would allow farmers to easily map the area in question and identify waters within the

defined floodplain that may be jurisdictional. Placing no such limitation on the term “floodplain” makes the rule too broad to be easily interpreted and applied by the regulated community. Waters falling outside the rule’s defined floodplain would still be adequately protected by the “significant nexus” test under paragraph (7).

- The final rule should eliminate waters with either a shallow subsurface or confined surface hydrologic connection from the definition of “adjacent.” Such connections are not well-defined, not readily identified, and not an appropriate part of an otherwise straightforward jurisdictional test. Again, these waters would still be adequately protected via the “significant nexus” test under paragraph (7).

#### *Definition of “Significant Nexus” Under Paragraph (7)*

The proposed rule provides that a “**significant nexus**” exists where a water, including wetlands, either alone or in combination with similarly situated waters in the region [i.e., the watershed that drains to the nearest water identified in paragraphs (1) through (3)] significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1) through (3). For an effect to be “significant,” it must be more than merely “speculative or insubstantial.”

The proposed rule provides that waters are “**similarly situated**” when they perform similar functions and are located sufficiently close together or sufficiently close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1) through (3).

The “significant nexus” test seeks to incorporate changes required by recent Supreme Court decisions and to clarify that EPA and the Corps will not be seeking to regulate waters with a mere economic connection to other waters of the United States. While the “significant nexus” test seems like a reasonable distillation of current case law, we have serious concerns about the “similarly situated” portion of the test, and substantial ambiguities in how that standard will be applied in the context of certain on-farm wetlands. To resolve these ambiguities, we propose that the following changes be included in the final rule:

- A process that allows for transparent, public determinations of “similarly situated” waters, together with a well-defined and easily accessible appeals process for regulated parties;
- An enumerated list of the functions that waters must perform together in order to be considered “similarly situated”;
- A requirement that wetlands have either a shallow subsurface or confined surface hydrologic connection to each other in order to be considered “similarly situated” and that such connection be perennial and not the result of seasonal overflow.

EPA and the Corps also have requested comment on whether waters could be designated as “similarly situated” based on geographic delineations, such as eco-regions or watersheds. While geographic proximity should be one of the primary considerations in determining whether waters are “similarly situated” and whether they significantly impact a regulated water, it is also vital to consider whether there is a significant hydrological connection between the waters. It is difficult to see the benefit in making this type of designation on either an eco-region or watershed basis, and the proposal to do so injects unnecessary ambiguity into a standard that already requires a somewhat subjective case-by-case determination. We would recommend that the final rule incorporate the above suggestions for clarifying process and standards and not include provisions for watershed-based determinations.

## *Ditches & Waters Excluded from Clean Water Act Jurisdiction*

The proposed rule specifically exempts an enumerated list of certain waters from the definition of “waters of the United States,” including:

- Prior converted cropland;
- Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow;
- Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1) through (4);
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Groundwater; and
- Gullies, rills and non-wetland swales.

While we support the overall goal of improving regulatory certainty by enumerating a list of specific *per se* exemptions from Clean Water Act jurisdiction, we urge more detailed definitions for certain terms in the final rule. This type of clarification is particularly important in light of all the controversy surrounding the proposed rule’s treatment of agricultural ditches. At a minimum, the final rule should:

- Provide a basic definition of “ditch” and clarify the definitions of “upland” and “perennial flow” to help determine whether a ditch is regulated or exempt;
- Clarify the definition of “upland” to include any land that is not a wetland, floodplain, riparian area, or water;
- Clarify the definition of “perennial flow” as the presence of water in a tributary year-round when rainfall is normal or above normal;
- Provide basic definitions for “gully,” “rill,” and “swale,” specifically including language that differentiates these erosion features from “tributaries” that are jurisdictional.

## **Process for On-Farm Enforcement of the Rule**

A significant share of the concerns circulating within the farming community around the proposed rule derive from a lack of clarity and understanding of the on-the-ground logistics of enforcing the rule. Many farmers are picturing an EPA agent coming onto each farm in the state of Iowa, performing an inspection, and then telling the farmer how to run the farming operation. As part of alleviating these concerns, it is vital that EPA and the Corps provide clear guidance for farmers to help them understand:

- who would be responsible for enforcing the rule on the local level;
- what the process would be for enforcing the rule and making a jurisdictional determination on the local level, including illustrative examples of what types of circumstances or activities would trigger a closer look at on-farm waters;
- what the process would be for a farmer seeking an agency opinion as to whether an on-farm water is jurisdictional;
- what assistance would be available for a farmer dealing with a jurisdictional water as part of an active farming operation.

Most farmers have lengthy experience interacting with federal government agencies and complex federal regulations. Local field offices operated by the U.S. Department of Agriculture routinely work with farmers to ensure compliance with federal farm programs, including rules for program enrollment, conservation compliance requirements for commodity subsidy programs, and technical requirements for participation in federal conservation programs. Farmers know the staff in their local Farm Service Agency and NRCS offices; they know where to go when they have questions about the rules; they know what to expect from those offices in terms of enforcement. Much of the fear and distrust in the farming community related to this proposed rule derives from a general lack of familiarity with the enforcing agencies and a lack of clarity on the basics of the regulatory process.

EPA has indicated that the Corps is the principal federal agency responsible for conducting jurisdictional determinations under the Clean Water Act, generally performed via Corps District offices. Any additional specifics related to logistics and process that could be provided in the form of guidance accompanying the final rule could help to increase basic comfort levels and avoid future episodes of the sort of dysfunctional showdown that has occurred within the farming community in the context of the current proposed rule.

### **Protections for On-Farm Conservation & Pollution Control Practices**

EPA has worked extensively with the state of Iowa over the past decade to improve water quality by:

- (1) ensuring that the state is properly enforcing the Clean Water Act in the context of confined animal feeding operations (CAFOs); and
- (2) creating a statewide strategy to reduce the nitrate and phosphorus pollution that is contaminating Iowa watersheds and contributing to the hypoxia zone in the Gulf of Mexico.

While addressing the CAFO issue will require increased inspections and NPDES permitting requirements, both of these water quality priorities have necessitated significant investments by the state and the agricultural community in improving voluntary on-farm conservation and pollution control measures. We already have offered comments on the Interpretive Rule published by EPA and the Corps earlier this year. NRCS programs (the Conservation Security Program, the Environmental Quality Incentives Program, etc.) certainly play a significant role in promoting on-farm conservation practices that protect and enhance water quality. Farmers also rely on a variety of state and local entities, including cost share programs available through the Iowa Department of Agriculture and Land Stewardship, regional watershed initiatives, and programs carried out via local soil and water conservation districts. Whether the conservation practice involve installing and maintaining buffer strips, grassed waterways, or wood chip bioreactors, it is absolutely essential that the proposed rule provides the strongest possible protections for any measures that will improve the quality and health of Iowa's watersheds.

In addition to the concerns already expressed above that are specific to the Interpretive Rule and NRCS technical standards, many farmers have expressed more general concerns that the proposed rule will prevent something as simple as installing a grassed waterway (would this be a regulated water? if I have an existing grassed waterway, can I still farm around it?) The state's voluntary strategy to reduce nitrate and phosphorus pollution by 45 percent (with approximately 90 percent of the pollution coming from agricultural sources) already faces a variety of systemic challenges. For example, many farmers are reluctant to adopt new practices until they see a critical mass of their neighbors doing the same thing.



With farmland in high demand, it can be challenging to convince farmers to take valuable land out of production for conservation purposes. Some conservation practices such as cover crops can actually increase productivity and yields, but farmers need to be up-to-date on the latest research on crop rotations to know which cover crops will work on their farm and also feel comfortable incorporating new and unfamiliar cropping practices. In light of these and other challenges, Iowa cannot afford the setback of having farmers across the state believe - rightly or wrongly - that the proposed WOTUS rule will prevent them from actively pursuing expanded on-farm conservation practices. Unless the final rule is clearly and strongly protective of the widest possible range of on-farm conservation practices, the rule may serve the counter-productive end of discouraging Iowa farmers from working to improve our state's water quality.

### **Conclusion**

IFU recognizes the highly technical and complex nature of the subject matter covered by the proposed rule. We appreciate the extensive efforts by EPA and the Corps to work with the farming community to answer questions and address concerns, and we share the overall goal of enhancing protections for our nation's water resources while improving regulatory certainty. We hope that the above comments will assist in crafting a final rule that achieves those goals while also being adequately mindful of the issues and concerns raised by the farming community. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.M. Linderman', with a long horizontal flourish extending to the right.

Jana M. Linderman  
President